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Supreme Court U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 237.

PETER PEARSON AND ENOCH PEARSON,
Petitioners,

vs.

WILLIAM WILLIAMS,
UNITED STATES COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK,
Respondent.

BRIEF FOR PETITIONERS

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

EUGENE TREADWELL,
Counsel for Petitioners.

United States Supreme Court.

PETER PEARSON AND ENOCH PEARSON,
Petitioners,

against

WILLIAM WILLIAMS, United States Commissioner of Immigration at the Port of New York,
Respondent.

October Term 1905.
No. 237.

Brief for Petitioners on Certiorari.

STATEMENT.

The record shows that the Circuit Court of Appeals for the Second Circuit, by a divided Court, two of the Judges therein concurring, and one thereof dissenting, reversed the judgment of the Circuit Court of the Southern District of New York, which, after a hearing upon a writ of *habeas corpus* brought by the petitioners, together with one John Wakefield, against the above-named respondent, sustained the writ and discharged the said petitioners from custody.

The judgment of the Circuit Court of Appeals was rendered upon an appeal by the United States Commissioner of Immigration at the Port of New York from the order of the Circuit Court for the Southern District of New York (Transcript of Record, top p. 112), made and entered the 10th day

of June, 1904, discharging the petitioners from the custody of the said Commissioner, who held them for deportation to the country from which they came under and by virtue of a warrant or order of the Secretary of Commerce and Labor (p. 109). There was no question of fact at issue on this appeal. The return did not deny the facts set forth by the petition. The answer (p. 110) filed by the petitioners did not deny any of the facts set forth in the return made by the said Commissioner to the *writ of habeas corpus* granted on the petition of the said petitioners (p. 107). The material facts as they appear in the petition, and the return (pp. 2, 3, 107, 109) are as follows:

Both petitioners are aliens (p. 2) and arrived at the Port of New York from England, on or about February 1, 1904 (p. 3). Upon their arrival, on or about February 1, 1904, the said petitioners were detained at said port under the provisions of law (p. 3) and thereupon they were examined by a Board of Special Inquiry duly appointed for the said Port of New York, which said Board of Inquiry consisted of Messrs. Moler (chairman), and Weihe and Eppler, Inspectors, and which said Board of Special Inquiry was appointed and acted pursuant to Section 25 of the Act of Congress, approved March 3, 1903, entitled, "An Act to Regulate the Immigration of Aliens into the United States" (p. 8).

The petitioners, and each of them (p. 3) were duly sworn, fully and exhaustively examined upon complaint made as to an alleged violation of the laws of the United States in coming as aliens to the United States, under contract or agreement, parol or special, express or implied, offer, solicitation, promise or agreement, to perform labor or service therein, and more particularly, for or in connection with Joseph S. Lesser, of the International Lace Manufacturing Company, of Gouverneur, New

York, and at the close of such examination the decision of the said Board was unanimously in favor of the petitioners, and the petitioners were unanimously admitted.

Subsequently they were arrested upon a warrant issued by the Secretary of Commerce and Labor, bearing date March 21, 1904 (p. 30), and were taken before a Board of Special Inquiry consisting of the same persons, to wit: Messrs. Moler, Chairman, and Weihe and Eppler, Inspectors (p. 29), who constituted the same Board of Special Inquiry that acted in the case of the said petitioners on or about February 1, 1904, and the said petitioners arrested as aforesaid on the warrant dated March 21, 1904, were given opportunity to show cause why they should not be deported from the United States (Pars. 3, 4 and 5 of the Petition (pp. 2–3). This same Board of Special Inquiry had before decided unanimously that the petitioners should be admitted to the United States (pp. 16, 17).

Neither in the evidence upon which the Commissioner of the Department of Commerce and Labor issued his said warrant for the arrest of the petitioners, nor in the evidence or testimony taken before the Board of Inquiry, pursuant to said warrant, on the 29th and 30th days of March, 1904, copies of all of which evidence, testimony and papers have been annexed to the petition for the *habeas corpus*, and are contained in the Exhibits 3 (pp. 8–29), 4 (pp. 29–101), and 5 (pp. 102–103), appeared, or was even suggested, any other charge or violation of law than the same charge or violation, viz.: of coming as aliens to the United States under contract or agreement, parol or special, expressed or implied, promise, offer, solicitation or encouragement, with, by, or from the said Joseph S. Lesser or the International Lace Manufacturing Company, of Gouverneur, New York, upon which said charge the previous decision of the said Board of Special Inquiry lawfully consti-

tuted and unanimously made in favor of the said aliens, was by the statute final and without review.

The Board of Special Inquiry at the second hearing as aforesaid, commenced at Ellis Island, New York, March 29, 1904 (p. 29), took testimony as to whether the petitioners were justly and properly entitled to be allowed to land in the United States at the time of their arrival at the Port of New York, to wit: on or about February 1, 1904. The said Board of Special Inquiry after weighing and considering the evidence given on the last hearing, did not make a decision in reference thereto, but recommended that two of said petitioners, to wit: Peter Pearson and Enoch Pearson, should be deported, and that the other alien, to wit: John Wakefield, should be discharged (p. 3, Par. 5, admitted in answer, p. 108).

The affidavits upon which the warrant for the arrest of the petitioners was issued by the Secretary (Exhibit 3, pp. 17–28) charge the same alleged violation and no other, relating, as all of them do, to the question of employment of the petitioners by Joseph S. Lesser or the Gouverneur Company.

The decision of the Secretary (Exhibit 6, p. 118) charges the same alleged violation, viz.: employment by Joseph S. Lesser, or the Gouverneur Company, and no other.

The Secretary of Commerce and Labor decided that the said petitioners who landed at the Port of New York, on the 1st day of February, 1904, were in this country in violation of the Acts of Congress, approved February 26, 1885, February 23, 1887, March 3, 1891, and March 3, 1903, and he thereupon on May 3, 1904, issued a warrant for their deportation (p. 109).

Before the decision and the issue of the warrant of deportation, and while these petitioners were in the custody of the respondent, they commenced a *habeas corpus* proceeding wherein an order was

made directing their discharge (p. 112). Pending the determination of an appeal, the petitioners were released on bail to answer the final judgment of the Circuit Court of Appeals (p. 113).

That the Secretary's deportation proceedings from beginning to end, were based solely upon the identical charge of violation of the statute, employment, etc., by Joseph S. Lesser or the Gouverneur Company, upon which charge the petitioners had been previously challenged, arrested on the Cunard Dock, and held for examination by the Special Board of Inquiry, and thereafter sworn and fully examined by said Board, and by it unanimously admitted, was specifically alleged in the petition (p. 4, Par. IX.) was not denied or controverted by the return, and is therefore admitted.

The decision of the Circuit Judge sustaining the writ and discharging the aliens (p. 107) was based upon the ground that the old act making the decision of the Board of Special Inquiry final when adverse to the alien, the new act making the decision final without any such qualification, the change was significant and the unanimous decision of the board in favor of the aliens should be taken as conclusive.

The Circuit Court of Appeals (p. 129) reversed the Circuit Judge on the ground that the Special Board of Inquiry was subordinate to the Secretary, and that the Secretary was vested by the provisions of section 21 of the Act of March 3rd, 1903, with authority to investigate and report independently of and adversely to the unanimous decision of the Board of Special Inquiry upon the same question.

The Circuit Court of Appeals did not find the disclosure by the warrant proceedings instituted by the said Secretary of any fraud upon the part of the aliens in coming into the country, or of any additional evidence of any violation of the law.

STATUTES.

(1) The following are the Acts of Congress pertinent to the subject :

Act of February 26, 1885 (23 Stat. L., 332), Sections 2. and 5.

Amendment October 19, 1888 (25 Stat. L., 565).

Amendment Act March 3d, 1891, Section 8, (26 U. S., Stat. L., 1084).

Act of March 3d, 1893, Section 5 (27 Stat. L., 569).

Appropriations Act, August 18, 1894 (2 Sup., U. S. R. S., p. 253).

Act of March 3d, 1903, Sections 2, 20, 21, 24, and 25 (32 U. S., Stat. L., 1213).

Act of February 14, 1903, Establishing Department of Commerce and Labor, Section 7.

(2) The statutory authority, under which the Commissioner claims the right to issue his warrant and take the proceedings had herein, was at first incorporated in the amendment of October 19, 1888, (25 Stat. L., 565) ; and subsequently re-enacted in the Act of March 3d, 1903, Section 21.

Sections 20 and 21 are as follows (italics ours):

"Sec. 20. That any alien who shall come into the United States in violation of law, or who shall be found a public charge therein, from causes existing prior to landing, shall be deported as hereinafter provided to the country whence he came at any time within two years after arrival at the expense, including one-half of the cost of inland transportation to the port of deportation, of the person bringing such alien into the United States, or, if that can not be done, then at the expense of the immigrant fund referred to in section one of this Act.

Sec. 21. That in case the Secretary of the Treas-

ury shall be satisfied that an alien has been found in the United States in violation of this Act he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided in section twenty of this Act, or, if that cannot be so done, at the expense of the immigrant fund provided for in section one of this Act; and neglect or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of the Treasury to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this section shall be punished by the imposition of the penalties prescribed in section nineteen of this Act."

(3) The provisions for the detention and examination of aliens on their arrival appeared first in the Act of March 3d, 1891, Section 8, which was subsequently amended by the Act of March 3d, 1893, Section 5, which was again amended by the Act of March 3d, 1903, Sections 24 and 25, the provisions now in force.

Sections 24 and 25 are as follows (italics ours):

"Sec. 24. That immigrant inspectors and other immigration officers, clerks, and employees shall hereafter be appointed, and their compensation fixed and raised or decreased from time to time, by the Secretary of the Treasury, upon the recommendation of the Commissioner-General of Immigration and in accordance with the provisions of the civil-service Act of January sixteenth, eighteen hundred and eighty-three: Provided, That nothing herein contained shall be construed to alter the mode of appointing commissioners of immigration at several ports of the United States as provided by the sundry civil appropriation Act approved August eighteenth, eighteen hundred and ninety-four, or the official status of such commissioners heretofore appointed. Immigration officers shall have power to administer oaths and to take and consider testimony touching the right of any alien to enter the United

States, and, where such action may be necessary, to make a written record of such testimony, and any person to whom such an oath has been administered under the provisions of this Act who shall knowingly or wilfully give false testimony or swear to any false statement in any way affecting or in relation to the right of an alien to admission to the United States shall be deemed guilty of perjury and be punished as provided by section fifty-three hundred and ninety-two, United States Revised Statutes. The decision of any such officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investigation. *Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry.*

Sec. 25. That such boards of special inquiry shall be appointed by the commissioners of immigration at the various ports of arrival as may be necessary for the prompt determination of all cases of aliens detained at such ports under the provisions of law. Such boards shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner-General of Immigration, with the approval of the Secretary of the Treasury, shall from time to time designate as qualified to serve on such boards: Provided, That at ports where there are fewer than three immigrant inspectors, the Secretary of the Treasury, upon recommendation of the Commissioner-General of Immigration, may designate other United States officials for service on such boards of special inquiry. *Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or be deported. All hearings before boards shall be separate and apart from the public, but the said boards shall keep complete permanent records of their proceedings and of all such testimony as may be produced before them; and the decision of any two members of a board shall pre-*

vail and be final, but either the alien or any dissenting member of said board may appeal, through the commissioner of immigration at the port of arrival and the Commissioner-General of Immigration, to the Secretary of the Treasury, whose decision shall then be final; and the taking of such appeal shall operate to stay any action in regard to the final disposal of the alien whose case is so appealed until the receipt by the commissioner of immigration at the port of arrival of such decision."

Assignment of Errors.

1. The Circuit Court of Appeals erred in holding that the unanimous decision of the Board of Special Inquiry allowing the petitioners Peter Pearson and Enoch Pearson to land, was not conclusive or *res adjudicata* upon their right to remain in the United States.

2. The Circuit Court of Appeals erred in holding that the said Peter Pearson and Enoch Pearson entered the United States subject to the condition that they might be deported by order of the Secretary of Commerce and Labor.

3. The Circuit Court of Appeals erred in holding that the warrant of the Secretary of Commerce and Labor was valid and with authority in law, in view of an unanimous decision of the Board of Special Inquiry admitting the said petitioners.

4. The Circuit Court of Appeals erred in not holding that under the facts as disclosed in the case the unanimous decision of the Board of Special Inquiry admitting the said persons was *res adjudicata* and binding upon the Secretary of Commerce and Labor.

5. The Circuit Court of Appeals erred in not holding that, the violation of law charged by the Secretary of Commerce and Labor in his warrant proceedings, being the same violation as charged against the said persons before the Board of Special Inquiry and unanimously decided in their favor by the Board, the warrant of the Secretary of Commerce and Labor was without authority in law.

6. The Circuit Court of Appeals erred in holding that the warrant of the Secretary of Commerce and Labor deporting the said petitioners was valid in law or authorized, in view of the unanimous de-

cision of the Special Board of Inquiry admitting them, and in the absence of fraud or of any additional evidence of any violation of the law.

7. The Circuit Court of Appeals erred in deciding that the said Peter Pearson and Enoch Pearson were lawfully restrained of their liberty and in holding the said Peter Pearson and Enoch Pearson in custody and in adjudging that they are not entitled in law to remain in the United States.

8. The Circuit Court of Appeals erred in dismissing the writ of habeas corpus herein and in remanding the said Peter Pearson and Enoch Pearson to the custody of the Commissioner of Immigration at the Port of New York.

POINTS.

I.

No provision authorizing warrant proceeding by the Secretary to review a decision of the Board of Special Inquiry acting under Section 25 of the Act of March 3rd, 1903. is to be found in any of the statutes.

No provision is to be found anywhere in the acts relating to a lien immigrants which authorizes warrant proceedings where the aliens have already been proceeded against under the provisions of Sections 24 and 25 of the Act of March 3d, 1903, upon the same charge and for the same alleged violation, and have been unanimously admitted by the Board of Special Inquiry.

II.

The administrative department of the Government, is of limited jurisdiction, and can have no jurisdiction except such as the statute confers.

(1) The rule of limited jurisdiction is well settled.

Harland vs. *U. L. T. Co.*, 40 Fed. R., 310;
Sheldon et al. vs. *Sill*, 8 How. (U. S.), *441, 449.

(2) There was no consent to the jurisdiction, or waiver of the question, by the aliens, they having been under arrest and duress.

(3) Jurisdiction could not be conferred by consent or waiver.

Burt vs. *Greaves*, 3 McCord, 280.
Dudley vs. *Mayhew*, 3 N. Y., 9 and 12.
Burckle vs. *Eckhart*, 3 N. Y., 137.

III.

As to the construction of the statute in question, and, indeed, of all acts of Congress, the jurisdiction of the Federal courts is ample and exclusive in all cases arising under the execution of such statutes, and the question now presented is wholly and exclusively within the jurisdiction of this Court.

The writ of habeas corpus was the proper remedy to be invoked by the petitioners

The duty of the courts to examine and determine the right of any individual restrained of his personal liberty to be discharged from such restraint, and incidentally to determine the jurisdiction of any official attempting to exercise such restraint, has been emphatically reaffirmed in the last case before the United States Supreme Court, in which the Act of March, 1903, was involved.

Turner vs. *Williams*, 194 U. S., 279, 295.

IV.

Under the Act of March 3d, 1903, the unanimous decision of the Board of Special Inquiry in favor of the aliens is conclusive upon their right to remain in the country.

THE BOARD OF SPECIAL INQUIRY ACQUIRED FULL JURISDICTION IN THE PREMISES.

(1) The last paragraph of Section 24 of the act provides:

"Every alien who may not appear to the Examining Immigrant Inspector at the port of arrival to be clearly and beyond a doubt entitled to land, shall be detained for examination in relation thereto by a Board of Special inquiry."

(*a*) The Immigration Department had received before the arrival of the aliens certain notices (p. 13). Thereafter and on arrival of the aliens at the port of New York, and immediately on leaving the steamship and while on the dock, they were taken in custody by the officials of the Department (p. 3, par. vi.) and forthwith taken before the Board of Special Inquiry.

(*b*) The first paragraph of Section 25 of the act provides as follows:

"Sec. 25. That such Boards of Special Inquiry shall be appointed by the Commissioners of Immigration at the various ports of arrival as may be necessary for the prompt determination of all cases of aliens detained at such ports under the provisions of law. Such boards shall consist of three members * * *."

(*c*) It was conceded by counsel for respondent on both of the arguments below that the Board before which the aliens were taken February 1, 1904, consisting of Messrs. Moler, Weihe and Eppler was a duly constituted Board of Special Inquiry, as provided by the Sections 24 and 25.

(*d*) Section 25 contains the further provision:

"Such Boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or be deported."

CONGRESS BY THIS EXPLICIT LANGUAGE THUS CONFERRED FULL POWER AND JURISDICTION UPON THE BOARD OF SPECIAL INQUIRY TO HEAR AND *determine* THE QUESTION.

This tribunal thus specially constituted by Congress was by the same section clothed with other *indicia* common to tribunals of judicial character.

(*e*) The section provides:

"All hearings before Boards shall be separate and apart from the public, but the said Boards shall keep complete permanent records of their proceedings and of all such testimony as may be produced before them."

(*f*) From the foregoing it appears that Congress had thus specifically created a complete and independent system of detention and examination of alien immigrants upon alleged violations of the law.

(2) There can be no doubt, and no question has been made by the Government anywhere in these proceedings, but that the Board of Special Inquiry before whom the aliens were brought in February

1, 1904, had by force of the provisions of Sections 24 and 25, full power to entertain the charge of violation of the statute by the aliens in coming into the country to perform labor therein under alleged employment, inducement, etc., by Joseph S. Lesser or the Gouverneur Company.

(*a*) The minutes of the examination which ensued (pp. 8 to 16) show, and it is conceded, that the Board examined the aliens under oath, fully and at length, in relation to the charge above mentioned.

(*b*) The examination was conducted to the limit desired by the Board; and upon its conclusion by the Board the aliens were admitted by the *unanimous* vote of the Board (pp. 16, 17).

(3) Congress made this unanimous decision final.

(*a*) Section 25 proceeds as follows:

"And the decision of any two members of a Board shall prevail and be final but either the alien or any dissenting member of the said Board may appeal, through the Commissioner of Immigration at the port of arrival and the Commissioner-General of Immigration, to the Secretary of the Treasury, whose decision shall then be final."

(*b*) The decision of the Board is thus made final by explicit language. Appeal is only provided where the decision is adverse to the alien, in which case it may be taken by the alien; or where the decision is made by a divided Board, in which case the appeal may be taken by the dissenting member.

(4) DECISION WAS FINAL AS TO THE SECRETARY AS WELL AS THE COURTS.

Respondent's counsel contended that the decision

is not final as to the Secretary, but only final as to the Courts.

The restriction contended for is not permissible.

The language of the section is plain and specifically includes the Secretary.

By cutting off all appeal to him in case of a unanimous decision it specifically excludes him.

Where the language is not ambiguous its plain import must be followed and there is no room for construction.

U. S. vs. *Bowen*, 100 U. S., 508, 513.
Tompkins vs. *Hunter*, 149 N. Y., 117, 123.

V.

The Circuit Court rightly decided that the change in the law made the decision of the Board of Special Inquiry final.

The rule of construction to be followed with regard to the present act is the same as with regard to the original act of February 26, 1885.

In construing these statutes we are to get at the spirit and meaning of the act, regarding the evil which is designed to remedy, and looking at the situation as it existed, including the interpretation by the Courts of the previous statutes as they were known to Congress at the time of the passage of the present act.

Church of the Holy Trinity vs. *United States*, 143 U. S., 457, 463.
United States vs. *Wong Kim Ark*, 169 U. S., 649, 657.
In re. Ellis, 124 Fed. Rep., 637, 641.

The Act of March 3rd, 1891, Section 8, contains the following:

"All decisions made by the inspection officers or their assistants touching the right of any alien to land when adverse to such right shall be final unless appeal be taken to the Superintendent of Immigration, whose action shall be subject to review by the Secretary of the Treasury."

The subsequent Appropriation Act of August, 1894 (2 Supp. R. S., 253) contains the following:

"In every case where an alien is excluded from admission into the United States * * * the decision of the appropriate immigration or customs

officers if adverse to the admission of such alien shall be final, unless reversed on appeal," etc.

These provision, which are substantially alike, were the provisions which were in force and received the construction of the Courts *in all of the cases hitherto arising* under the Contract Labor Laws, including those cited below by counsel for appellant.

Lem Moon Sing vs. *U. S.*, 158 U. S., 538, 547.

Li Sing vs. *U. S.*, 180 U. S., p. 490.

U. S. vs. *Lau Sun Ho*, 85 Fed. R., 422.

Chain Chio Fong vs. *U. S.*, 133 Fed. R., 154.

Japanese Immigrant Case, 189 U. S., 86.

In all of these cases the Court held that under the terms of the statute the decision of the immigration officer was only final "when adverse to the alien."

It is also to be noted in this connection, that during all this time the decision was that of a single official with no safeguards provided for arriving at the truth of such challenge or complaint, and no examination under oath on the charge.

The proceeding was summary, informal and arbitrary.

No charge having been made to the inspector, he would obviously be without a guide in his examination, which, under the circumstances, would usually be perfunctory and limited to an inquiry as to nationality, in view of the Chinese Exclusion Act, and to examine for physical defects or existing disease.

The law thus remained unchanged until the Act

of March 3rd, 1893, when a different procedure was instituted.

Under Section 5 of that Act the inspector instead of passing at once upon the admission of the alien as under the previous acts, was obliged to detain *every alien* (unless it clearly appeared to him that such alien was entitled to admission) for a special inquiry before a board of four officials acting as inspectors, to be designated by the head of the department, and no immigrant could be admitted upon such inquiry except upon a favorable decision of at least three of said inspectors.

This was the first creation of a board of special inquiry, and for the first time Congress exhibited an intent to give greater care and attention to the examination and *greater weight to the decision of the Board.*

The finality of the decision was not explicitly provided for; the language used is as follows:

"And any decision to admit shall be subject to appeal by any dissenting inspector to the Superintendent of Immigration, whose action shall be subject to review by the Secretary of the Treasury, as provided in Section 8 of said Immigration Act of March 3rd, 1891."

The finality of the decision was therefore to be inferred in the absence of any appeal or of any dissenting inspector, when the decision was favorable to the alien.

No case appears to have arisen which called for the construction of Section 5 of the Act of 1893.

After a further lapse of ten years, a period exceeding that which had previously elapsed since the enactment of the first contract labor law, Congress again took up the entire subject, collated various provisions together, retaining some in their original

form, and amplifying others, particularly the provisions applying to the detention and examination of immigrants.

CONGRESS BY SECTIONS 24 AND 25 OF THE PRESENT ACT LARGELY AMPLIFIED THE SYSTEM PREVIOUSLY INAUGURATED IN 1893.

Elaborate provisions were introduced with regard to the inspectors, clothing them with power to administer oaths, take testimony and reduce the same to record, providing for the punishment of any person to whom such oath had been administered for the giving of false testimony, subjecting any such primary decision, if favorable to the alien, to challenge, which should bring the alien before the Board of Special Inquiry, and directing that every alien, unless his right to land appeared beyond doubt, should be detained for examination before a Board of Special Inquiry.

Congress also provided with detail in Section 25 for the creation of such board, and, as we have seen, specifically conferred upon such board, authority to determine the question before them.

Such board was made a *board of record* and their majority decision *specifically made final*, subject only to reversal on appeal; and in event of being unanimous not even subject to appeal.

THUS CONGRESS NOT ONLY CHANGED THE LANGUAGE OF THE PREVIOUS PROVISIONS, BUT CHANGED THE SCHEME SUBSTANTIALLY, CLOTHING THE BOARD WITH GREATER POWERS, PROVIDING A PERPETUATION OF THEIR RECORDS, AND RENDERING THEIR DECISION FINAL, SUBJECT ONLY TO REVERSAL IN THE CASES, AND IN THE MANNER, SPECIFIED IN THE SECTION.

The change was significant.

(Opinion of LACOMBE, Circuit J., p. 107.)

Material change of expression imports change of intention.

Am. Ency. of Law (2nd ed.), Vol. 26, p. 652.
U. S. vs. *Bashaw*, 4 U. S. Appeals, 360.

The earlier provisions, as we have seen, had been construed by the courts and held not to render the decision final.

A change made after judicial interpretation of the previous enactment infers that the interpretation was before the Legislature and the change is presumed to have been made to obviate that interpretation.

U. S. vs. *Mooney*, 116 U. S., 104.
U. S. vs. *Cent. Pac. R. Co.*, 118 U. S., 235.
U. S. vs. *Le Bris*, 121 U. S., 278.
Crawford vs. *Burke*, 195 U. S., 176, 190.

Terms which have acquired through judicial interpretation a well understood legislative meaning are presumed to be used by the Legislature in the sense determined by the authoritative decisions.

The Abbotsford, 98 U. S., 440.
Kepner vs. *United States*, 195 U. S., 100, 124.
Hackfeld, &c., vs. *United States*, 197 U. S., 451.

THE SCHEME ADOPTED BY CONGRESS IN THE LATER ACT OF MAKING THE DECISION FINAL WHEN UNANIMOUS IS NOT NOVEL, A PROVISION OF SIMI-

LAR NATURE EXISTING IN THE CODE OF THE STATE OF NEW YORK.

New York Code of Civil Proc., Section 191, subdivisions 2 and 4.

The policy both of Congress and the New York Legislature was to relegate certain questions to the intermediate tribunal for final determination.

Counsel for respondent suggested a limitation of Sections 24 and 25 of the Act of March 3rd, 1903, which would in his view leave the Secretary still with jurisdiction in the present case to issue warrant proceedings under Section 21. He endeavored to make a distinction between the "right to land," as found in Section 25, and the right *to be or remain.*

THE DECISION WOULD THUS ONLY BE FINAL FOR FIVE MINUTES.

No such distinction is made anywhere by the language of the statute itself.

On the contrary, the express language of the statute in many places establishes that the "right to land" and the right to be and remain are the same.

In Section 24 the following language is used:

"Immigration officers shall have power to administer oaths and to take and consider testimony touching the right of any alien *to enter* the United States. * * * Any false statement in any way affecting or in relation to the right of an alien *to admission* to the United States. * * * The decision of any such officer, if favorable to the *admission* of any alien, shall be subject to challenge by any other immigration officer, and such challenge shall operate to take the alien whose right to

land is *so challenged* before a Board of Special Inquiry for its investigation."

In Section 25 is stated the power of the Board before whom is taken the immigrant whose "right to land" is *so challenged*. Such Boards shall have authority to determine whether an alien who has been duly held shall be "allowed to land" or be "deported."

Thus, we have the words "admission" and "right to land" used in close context as synonymous, and furthermore the use of the words, "right to land" in full contradistinction to the word "deported." The word "admission" certainly implies the right to be or remain.

"Deported" is the word also used in the section authorizing the warrant proceedings (Section 21 of the Act).

In the original act (23 Stat., L. 332, approved February 26th, 1885) the language used is "importation to," "migration of" (Sections 1 and 2). In the amendatory act, approved February 23d, 1887 (24 Stat., L. 414, enacting clause), the same words are used. The words used in the Act of March 3d, 1891 (enactment clause) are "excluded from admission." In Sections 10 and 11 of that act the words are "come into." Act of March 30, 1893, Section 5, the words are "entitled to admission," "any decision to admit." In the Appropriation Act, approved August 18th, 1894, the language used is "excluded from admission." The Act of March 3d, 1903, Sec. 2, the language is "shall be excluded from admission."

Thus, we see that the Board of Inquiry, under Section 25, was authorized to do, in case they so found, all that the Secretary was authorized to do by Section 21, namely, to deport. The language used, therefore, is ample to clothe the Board of Special Inquiry with power to decide the question,

not merely whether the immigrant may at *that time*, and for the time being, land from the ship or Immigration Buildings at Ellis Island to the main territory of the United States, but *admission to the United States*, which carries with it the right to remain.

As we have seen, the words "right to land" are used in these sections which provide for a deliberate method of inquiry absolutely as synonymous to admission.

Admission in its ordinary sense, and as applied in such connection, always includes the right to remain; for example, "admission to the bar," "admission to the church," and "admission to citizenship," all include the right to continue in the privileges which admission conferred.

On the examination of February 1st, 1904, by the Board of Special Inquiry, the language used at the close is significant (pp. 16, 17).

> "*Mr. Weihe.*—I move to admit.
>
> * * * * * *
>
> *Mr. Eppler.*—I second the motion to admit.
>
> *Mr. Moler.*—They are admitted.
>
> Aliens unanimously admitted."

The foregoing construction by the Board itself is more in conformity with the language of the statute than the contention of the counsel for the Commissioner, and serves to show how the authorities themselves regarded their action.

VI.

The Circuit Court of Appeals erred in construing the present statute.

1. The Court below erred in relying for authority upon the decision and opinion of this Court in a case arising under different circumstances and a different statute.

The Circuit Court of Appeals, as appears by its decision, printed post page 48, rests its decision upon expressions contained in the opinion of the Supreme Court in the *Japanese Immigrant Case*, 189 U. S., at p. 99. Both in the *Japanese Immigrant case, supra*, and in the case of *United States* vs. *Yamasaka*, 100 Fed. Rep., 404, referred to in the opinion of the Supreme Court in the same connection, the person involved had "clandestinely entered the country" and had never "even been admitted into the country pursuant to law."

Japanese Immigrant Case, supra, p. 98.

U. S. vs. *Yamasaka, supra*, page 405.

The Circuit Court of Appeals, in a case called to our attention since the argument below, seems to have formerly adopted a different construction of a somewhat similar provision, namely, Section 12 of the Act of September 13, 1888 (25 Stat., 476).

In re. Li Sing, 86 Fed. Rep., 896, 897, 898.

The opinion of the Court in that case, by Shipman, J., infering that by the terms of that section,

the decision of the Collector of Customs would have been final.

The expressions in the opinion of the Supreme Court in the *Japanese Immigrant Case*, *supra*, relied upon and quoted by the Circuit Court of Appeals in the present case were made with reference to the condition of the law as embodied in the statutes then existing but since changed, and, moreover, were applicable to the circumstances of that case, which differ radically from those in the present case.

THE PRESENT CASE PRESENTS AN ENTIRELY DIFFERENT ASPECT AND THE STATUTES NOW IN FORCE ARE SIGNIFICANTLY DIFFERENT FROM THOSE INVOLVED UNDER THE EARLIER DECISINS.

In the present case it is conceded that petitioners have been admitted into the country pursuant to law after full examination before the Board of Special Inquiry authorized by the statute, whose unanimous decision was made final by the terms of the same statute.

If the petitioners had surreptitiously entered the country the authority of the Secretary to deport them would have existed under the rule of the *Japanese Immigrant Case* and the subsequent statutory extension of the period from one year to three. The reasoning in the *Japanese Immigrant Case* may not be cited in favor of any greater authority in the Commissioner, and is inapplicable to the changed condition of the statute and the different circumstances of the present case.

2. The Court below erred in holding that the Board of Special Inquiry was a tribunal subordinate to the Secretary of Commerce and Labor.

In the opinion of the Circuit Court of Appeals, on page 130, it is said (post page 50):

"The board is a subordinate tribunal whose powers extend merely to the decision of the particular inquiry committed to it, and any adjudication beyond this, even if it were to be regarded as a judicial decision, would be *coram non judice.*"

The decision of the Board in the present case is conceded to have been within its jurisdiction.

The decision being unanimous in favor of the aliens, no appeal could be taken to the Secretary, who therefore was precluded from reviewing this decision. This Board is therefore, in this respect at least, not a tribunal subordinate to the Secretary.

3. The Court below erred in adopting a construction of the statute which conflicts with the express language thereof.

The opinion, page 131, contains the following language (post page 52):

"Manifestly Congress intended not only that the Secretary might review the question whether he (the alien) should be allowed to enter upon the appeal from the decision."

Here again the Court overlooks the *expressed* intention of Congress to cut off any appeal where the decision was unanimous in favor of the alien, and thus to prevent review by the Secretary.

4. The Court below erred in adopting a construction of the statute which fails to give effect to the material change in the statute.

If the injunction of Congress making the unanimous decision of the Board final is not applicable to the Secretary of Commerce and Labor, it is wholly idle.

There is no statutory provision authorizing any review or re-examination by any other tribunal or officer. In the absence of such provision no jurisdiction for such purpose may be assumed. No Federal or State Court could have challenged the right of the petitioners to remain in the United States.

No other official of the Government could have done so after the Board of Special Inquiry had acted and admitted the aliens, even if their action had not been unanimous but by a majority vote. Where their action is by a majority vote, appeal is the procedure provided by the statute, thus excluding all other procedure specifically if not for want of expressed statutory jurisdiction conferred.

Unanimous decision cut off review by the Secretary, so that no other tribunal or officer appears to come within the scope of the exclusion.

In fact, no suggestion is made of any other official or tribunal which could be aimed at by Congress in placing a finality upon the investigation of an alleged violation of the law in coming into the country *under contract of employment.*

The only existing jurisdiction for investigating *such violation* is found in the provision, Section 21, under which the Secretary of Commerce and Labor has claimed his authority in the present case. This provision existed prior to the change in the statute and must be considered as within the view of Congress. If it had had no other effect or scope than to indirectly provide for a review of the unanimous decision of the Board, it would doubtless have been repealed. But so long as it can have, and, in view of the many reported cases, evidently has had a wide scope of *original* action *in the absence* of action by the Board of Special Inquiry, Congress might naturally retain the provision for such purpose, and thus its legislation in excluding the action of the Secretary in one

class of cases is wholly consistent with authorizing such action under different circumstances.

And it none the less remains obvious and distinct that action by the Secretary was the only authorized action to which the injunction of Congress could relate.

The construction adopted by the Circuit Court of Appeals neither gives effect to the express exclusion of the Secretary when the decision is unanimous nor to the change in the statute making the decision final when favorable as well as when adverse to the alien.

VII.

The warrant and all proceedings had thereunder were and are wholly without authority of law.

That the charge of alleged violation for which the petitioners are detained is the same as that upon which they were unanimously admitted, is not only shown by the papers upon which the warrant was issued (Exhibit 3, pp. 13–29), but is conceded by the Government (see decision of Commissioner, Exhibit 6, p. 118).

Since the passage of the Act of March 3d, 1903, aliens coming to this country, who have been detained upon a specific charge, tried upon that charge by the Board of Special Inquiry, and admitted by the *unanimous* decision of that Board, are, under the provisions of Section 25 of that act, no longer subject for the same violation to arrest and deportation for the under the warrant proceedings authorized under the amendment of October 19, 1888; re-enacted Section 21 of the Act of March 3d, 1903.

The petitioners, Peter Pearson and Enoch Pearson, having been, upon their arrival in this country, detained upon a specific charge, examined by the Board of Special Inquiry, on a specific charge of violation of the statute in coming to this country to perform labor under contract or inducement, the Board having decided in their favor upon the charge unanimously admitting them, and the aliens having been discharged, the Secretary of the Department of Commerce and Labor was without jurisdiction over them *as respects such specific charge of violation*, and the issuance by him of the warrant and the subsequent proceedings were without authority of law.

VIII.

Warrant proceedings provided originally by the Act of October 19, 1888, and at present by Section 21 of the Act of March 3d, 1903, are not rendered useless by giving full effect to the plain language of Section 25.

Warrant proceedings would still apply in all cases where the aliens entered the country, either *clandestinely* or without challenge, detention and examination by the Board of Special Inquiry provided by Section 25.

In fact this is the very purpose for which the warrant proceedings were intended, and the very condition of circumstances in which warrant proceedings have been hitherto resorted to.

The attention of the Court is requested to Section 10 of the Act of March 3rd, 1903, as providing a scheme significantly different from that of Section 24, due to the difference in the nature of the violation. Where it is a question of disease or mental affection, the decision of the Board, based on a physician's certificate, if adverse to the alien, is final.

Doubtless such cases of violation would, under this language, remain subject to investigation by the Secretary under Section 21, in view of the decision in Li Sing vs. U. S., 180 U. S , 490.

By thus secluding a particular class of violations of the Act and applying a different restriction in Section 10, the intention of Congress in Section 25 to make the decision of the Board *final*, in cases *arising properly thereunder*, becomes *even more evident*.

Thus an ample and intelligent scheme has been, by the Act of March 3rd, 1903, provided by Congress for the two situations :

1st. Where the alien enters the country without complaint, detention and examination, and otherwise without the knowledge of the Department.

2nd. Where the Department has had notice, and the alien is challenged on entry, detained and examined under oath as to the alleged violation.

The last procedure is, under the detailed provisions of Sections 24 and 25, made ample and exhaustive, and is surrounded with special protection, full provision being made in the section (Section 24) for punishment of witnesses giving false testimony therein.

IX.

A construction of the statute which would permit the Secretary, under warrant proceedings, to review proceedings already had under Sections 24 and 25 of the Act of March 3d, 1903, resulting unanimously in favor of the admission of the aliens, would make the Act conflict with the recognized principles of justice, and, therefore, is not to be adopted.

(1) The Supreme Court has expressly clothed an alien immigrant with the protection of the principles contained in the Fifth Amendment in connection with the enforcement of the alien contract labor laws and warrant proceedings for deportation thereunder, and held that administrative officers may not when executing the provisions of a statute involving the liberty of persons, disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.

Japanese Immigant Case, 189 U. S., pp. 99, 100.

The principle that no person who has once been tried before a lawfully constituted tribunal and acquitted shall *non sua sponte* be again tried for the same offense is certainly one of the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.

In the case cited the Supreme Court, in its opinion (p. 101), proceeded to mention another of these principles bearing on the case then at bar, but a

principle no more fundamental or inhering in "due process of law" than the principle we invoke in the present case

(2) Even if an alien immigrant may not be a person wholly within the scope of the Fifth Amendment, nevertheless, according to the rules which prevail in all civilized nations, in the absence of express language authorizing him, no administrative officer of the government may execute a provision of the statute when thereby he subjects the person proceeded against to a re-trial for the same offense upon which he has already been tried and acquitted by a tribunal constituted and authorized to hear and determine the same charge under and by virtue of the provisions of the same laws.

Japanese Immigrant Case, supra.

(3) As we have seen in the case of the Japanese Immigrant, *supra*, the Supreme Court has practically decided that aliens are to be clothed with the protection of the principles contained in the Fifth Amendment.

(*a*) That a person once tried and acquitted before a duly constituted tribunal, with full power to investigate the charge made, may not again be tried upon the same charge, is too well settled as one of the principles inhering in "due process of law" to require citation of authorities.

The question is squarely presented whether an alien, who has once been detained, examined and unanimously acquitted under the provisions of Sections 24 and 25 of the Act, may, nevertheless, be arrested and examined on the same charge whenever and as often as the Secretary shall see fit, and, be deported.

The contention of the Government involves obvious hardship and unfairness to the aliens, clear violation of the Constitution, absolute contradiction of the plain words of the statute, and is without support of the existence of any language in the statute or of any necessary destruction of the purposes for which warrant proceedings may be lawfully *and frequently are* resorted to.

Counsel for respondent below contended that to restrict the power of the Secretary as conferred by Section 21 by decision of the Board, as provided in Section 25, would necessarily destroy the power conferred by Section 21. *This is obviously wrong.* Many cases are constantly occurring where the immigrant enters the United States without even being challenged, and where the Board of Special Inquiry, as constituted under Section 25, has *never acquired jurisdiction* or *investigated* the alleged violation. In such cases the immigrant is still subject to deportment under Section 21.

In fact the two proceedings constitute a complete scheme; the warrant proceedings under Section 21 applying where there had never been any challenge or investigation; the proceedings under Section 25 by the Board of Special Inquiry applying where, as in the present case, challenge was made and the immigrant detained, investigated and admitted. So *that each proceeding applies in its proper field.*

The warrant proceedings authorized by the Statute and the procedure provided by Sections 24 and 25 of the Act may exist together harmoniously and be applied each in their appropriate field without adding the power of revision in the one proceeding over the other, and thus the Act may be construed harmoniously and effect given

to both provisions without violating the fundamental law of the land and the plain import of the language of the Act.

We have seen that where the decision of the Board of Special Inquiry is unanimous the Secretary was prevented from reviewing such decision.

It is senseless, therefore, to contend that Congress, while intending to prevent the Secretary from reviewing the decision of the Board under such circumstances, still gave him power practically to review it by instigating an examination himself.

In other words, that the Secretary might defeat the statutory proceeding and a decision under Section 25 by indirection, which he could not accomplish directly.

Such construction is contrary to all the well settled canons.

In *Lau Ow Bew* vs. *United States*, 144 U. S., 47, on page 59, the Court uses the following language:

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion (*Church of the Holy Trinity* vs. *United States*, 143 U. S., 457; *Henderson* vs. *Mayor of New York*, 92 U. S., 259; *United States* vs. *Kirby*, 7 Wall, 482; *Oates* vs. *National Bank*, 100 U. S., 239)."

Statutes are to be construed so as to harmonize their provisions.

A harmonious construction is to be preferred which will avoid glaring abuse even under a statute termed "drastic" by the Circuit Court of Appeals (p. 131).

THE SECRETARY IN THIS CASE HAS LEGISLATED.

His construction renders nugatory the provisions of Section 25, which makes the decision of the Board of Special Inquiry final when unanimous in favor of the alien.

X.

The warrant proceedings disclosed no evidence of fraud on the part of the aliens in coming into the country or of any violation of the law.

While the courts have held that they would not consider the question of the *sufficiency* of the evidence upon which the immigration officials have decided or issued their warrant, nevertheless, as the law required some evidence, the courts have always reserved the right to hold as matter of law that there was no evidence on which the conclusion could be rested or action based.

Turner vs. *Williams*, 194 U. S., 279, 284.

There was no evidence of any fraud on the part of the aliens in coming into the country.

The proceedings instituted by the Secretary disclosed no new or additional evidence of any violation of the law.

The Circuit Court of Appeals found neither fraud nor additional evidence of any violation of the law.

Respondent's counsel in his brief before the Circuit Court of Appeals, and the Secretary in his decision (Exhibit 6, p. 169, fols. 506, 507) rested their case upon the claim that an illegal understanding existed because the aliens, on their first examination, stated that they were going to Wilkesbarre, but immediately upon being discharged went directly to Gouverneur. There was no evidence to support this claim.

Peter Pearson testified (p. 9):

"Q. Where are you going? A. Going to stay

in New York a day or two, and then we are going to a brother of mine in Wilkesbarre, Pa."

(p. 10):

"Q. Have you got a ticket to your destination? A. No."

(p. 10):

"Q. How long did you intend to stay in Wilkesbarre? A. I could not say; I couldn't give any definite period." * * *

(p. 12):

"Q. Know whether there is any lace establishment in Gouverneur, N. Y? A. Yes; because this Lesser told me that."

(p. 13):

"Q. You will take employment wherever you are able to receive it? A. Certainly."

Enoch Pearson testified generally (p. 14) that he was going to stay with his brother Peter; wherever Peter went, Enoch was going.

John Wakefield testified (p. 16):

"Q. You have no relatives or friends in this country? Except the Pearsons coming with you? A. No, sir.
Q. No address to go to except with them? A. No, sir."

On the second examination before the same Board Wakefield testified (p. 35):

"Q. Where did you propose to go yourself? A. I did not propose to go anywhere, only with my companions."

(p. 35):

"Q. You were *subject to change of mind* at any time? A. Yes."

Enoch Pearson testified (p. 56):

"Q. After you arrived and left here, where did you go? A. We went to New York and walked around and had something to eat, and then my brother and we went to Mr. Lesser's." * * *

Peter Pearson testified (pp. 62–63):

"Q. After you were permitted to land, what did you do then? A. It was late in the day, it was very cold, and we went and had something to eat and then of course I knew that Mr. Lesser was in New York.

Q. Had you known Mr. Lesser? A. Yes, sir.

Q. How many years had you known him? A. I could not say exactly. I saw him come to the firm where I worked, and I went there to see what he could do for me.

Q. Then you went to his place on that day? A. Yes, sir. * * *

Q. Who went with you? A. My brother and John Wakefield.

Q. Well, tell us as near as you can, what occurred when you saw Mr. Lesser? A. Well, when I saw Mr. Lesser he was surprised to see me here. I told him my business here, and I told him what I was after; asked him whether——

Q. What did he say? A. I asked him if he had a good situation. I told him that I had sold my business, of course, and that I had come to this country to get work.

Q. Yes? A. And that my brother was with me as well; whether he had anything; whether he could find me a situation as a corrector.

Q. What did he say? A. He told me that he could not give me a position as that, as he already had a man as corrector and reader, too.

Q. What did he say? A. He said that I could go up to Gouverneur, and there might be a chance of a situation as assistant manager. Of course, I never had been assistant manager before in my life. Of course, I have been among machines all of my life, and I felt myself fully qualified to take such a position, and naturally when he offered it to me I was very glad to take it.

Q. Go on and give as much of the conversation with Mr. Lesser as you can remember? A. I told him first of all that *my idea was to go to Wilkesbarre*, but he did not seem to want me to go there. I told him that I had my brother there, but he wanted us to go to Gouverneur, and if we would go there right away, he would undertake to pay all of the expenses, so as we could come back to New York if we did not get a situation" (*fols.* 258, 259, 260 and 261).

And again (p. 64):

"Q. Who paid your passage from here to Gouverneur? A. Mr. Lesser. I wanted to go to Wilkesbarre, and he said if we would go up with this young man that was going up there that night, he would undertake to pay our expenses.

Q. Pay your expenses up there whether you got a situation or not? A. Yes, sir."

In all this there was *no foundation for the suspicion* of the Secretary or of the government's counsel.

The evidence shows nothing more than intention to obtain work wherever possible, and change of destination from Wilkesbarre to Gouverneur *after* greater prospect of employment arising subsequent to admission.

Mere arbitrary "satisfaction" of the Secretary is not a compliance with the law, either in letter or in spirit. Under the rules promulgated with regard to the deportation proceeding, printed in the record at pages 6–7, no warrant for arrest and detention may be issued except based upon information, and, therefore, may not be arbitrarily issued.

Rule 5 (p. 7) refers specifically to the *evidence* upon which the Secretary acts in directing an alien's arrest.

SUSPICION MAY NOT TAKE THE PLACE OF EVIDENCE.

We respectfully submit that on the second examination of the petitioners the evidence was substantially the same as upon the first, and that there was nothing in addition upon which the Secretary relied except *unwarranted suspicion.*

Over and above all other considerations there stands concededly before the Court in the present case the effort on the part of the Secretary to *re-try* these aliens upon the *same charge* for which they had *already undergone full trial* and acquittal before a tribunal duly constituted by Congress *to hear and determine* the offense.

Such a proceeding is abhorrent to the principles of common law, and of all civilized communities, and cannot find support in statutory construction, except in a community where not only despotism prevails, but all sense of common fairness is absent.

XI.

We have not gone into the merits as to the charge made against the aliens solely because of the settled rule that the sufficiency of the evidence upon which the department decides is not reviewable by the Courts.

There was no violation of the law, and the evidence adduced, if passed upon by any tribunal, guided by the ordinary rules in weighing and considering testimony and evidence, and endowed with intelligence, such as is required by every civilized community from those to whom it entrusts such power and duty, would necessitate the free admission of all of the petitioners.

Merely because three of the resident weavers of Nottingham coming to the United States without previous promise or inducement or offer, on their arrival in the port of New York, are held for examination, and state that they are going to Wilkesbarre, and subsequently on being released, and while waiting they call upon in the same city an acquaintance of long standing who has, for many years, been in the habit of visiting Nottingham to buy goods there, and latterly to buy machinery for making such goods, are offered transportation to his factory and return, to enable them to apply for employment, if it can be given, and accept such offer instead of going to Wilkesbarre, where they had no definite offer, the Secretary has seen fit to find a violation ot the law.

We respectfully submit that such conclusion was based upon unjustified suspicion, and is without the support of any evidence.

The foregoing statement is made, because we wish it to be known that we invoked the aid of the Court in the discharge of the petitioners, not merely as a technical right, but as a relief from gross injustice and oppression, for which the writ is, and always has been, the approved remedy.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

EUGENE TREADWELL,
Counsel for Petitioners.

(*Opinion.*)

Opinion, Circuit Court.

UNITED STATES CIRCUIT COURT.

In the Matter

of

The Application of PETER PEARSON, ENOCH PEARSON and JOHN WAKEFIELD for a Writ of *habeas corpus.*

LACOMBE, J.:

The old act made the decision of the Board of Special Inquiry final when adverse to the alien; the new act makes the decision final (except for appeal to Secretary of the Treasury), without any such qualification. The change is significant, and the unanimous decision of the Board in this case in favor of entry and against deportation should be taken as conclusive. The relators are discharged—order will be settled on notice so that the Commissioner may take an appeal if so advised.

May 12, 1904.

(*Opinion.*)

Opinion Circuit Court of Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 129—October Term, 1904.

PEARSON *et al.*,
Appellees,

vs.

WILLIAMS, Commissioner, etc.,
Appellant.

Decided February 24, 1905.
Appeal from the Circuit Court of the United States for the Southern District of New York.
Before WALLACE, TOWNSEND and COXE, Circuit Judges.

WALLACE, Circuit Judge:

This is an appeal by the Commissioner of Immigration at the port of New York from an order in *habeas corpus* discharging the appellees from his custody. The appellees were aliens in the custody of the commissioners under a warrant of the Secretary of Commerce and Labor. They arrived at the Port of New York about February 1, 1904, and were detained for examination before a Board of Special Inquiry to ascertain whether they had come to this country in violation of law. The board, after hearing evidence, decided in their favor, and they were by its unanimous decision allowed to land. Thereafter, and on or about March 21, 1904, the Secretary of Commerce and Labor issued a warrant under which they were held in custody by the appellant, pending an inquiry to ascertain whether

they were here in violation of law as alien laborers who had come here under a previous contract to perform service. All the proceedings were had pursuant to the act of Congress of March 3, 1903, entitled "An act to regulate the immigration of aliens into the United States." The pertinent provisions of this act are these: Section 21 provides that in case the Secretary of the Treasury shall be satisfied that an alien has been found in the United States in violation of the act, he may cause such alien, within a period of three years after landing, to be taken into custody and deported. Section 24 provides that any alien who may appear to the examining immigrant inspector at the port of arrival not to be clearly and beyond doubt entitled to land shall be detained for examination in relation thereto by a Board of Special Inquiry. Section 25 provides that such board shall consist of three persons to be selected by the Commissioner-General of Immigration from the immigrant inspectors in his service, with the approval of the Secretary of the Treasury, and shall have authority to determine whether an alien who has been duly held shall be allowed to land or deported * * * and that the decision of any two members of the board shall prevail and be final; but that either the alien or any dissenting member of said board may appeal * * * to the Secretary of the Treasury, whose decision shall be final.

The powers conferred by these provisions upon the Secretary of the Treasury were subsequently vested in the Secretary of Commerce and Labor (Act of February 14, 1903).

It is insisted for the appellees, and this contention prevailed in the court below, that the decision of the Board of Special Inquiry, no appeal from it

having been taken, was final. The examination before that Board was addressed to the inquiry whether the aliens had come to this country in violation of law as contract laborers; and it is urged that the decision of the board is *res adjudicata* upon that question, and conclusive of their right to enter and remain.

We are of the opinion that the decision of the board has no other effect than a determination that the alien shall be permitted to land; that its functions are confined to this initial inquiry; and that it is competent for the Secretary of Commerce and Labor at any subsequent time during the three years, upon becoming satisfied that the alien who has been allowed to enter is notwithstanding here in violation of law to exercise the power of deportation. The board is a subordinate tribunal whose powers extend merely to the decision of the particular inquiry committed to it, and any adjudication beyond this, even if it were to be regarded as a judicial decision, would be *coram non judice*.

The existing provisions of law are substitutes for provisions of the earlier acts regulating the immigration of aliens. By Section 8 of the act of March 3, 1891, it was committed to the inspection officers at every place of arrival to detain alien immigrants for examination. They were authorized to administer oaths and take and consider testimony touching the right of such aliens to enter the United States, and it was provided that all decisions made by them "or their assistants" touching the right of any alien to land when adverse to such right should be final unless an appeal should be taken to the Superintendent of Immigration, and that his action should be subject to review by the Secretary of the Treasury. By Section 11 of that

act it was provided that any alien who should come into the United States in violation of law might be returned as by law provided at any time within one year thereafter. By an act of October 19, 1888 (25 Stats. at L. 565), the Secretary of the Treasury had been authorized, in case he should be satisfied that an immigrant had been allowed to land contrary to the law prohibiting the immigration of laborers under previous contract, to cause the immigrant within the period of one year after landing or entering to be taken into custody and returned to the country whence he came. Speaking of these enactments in Japanese Immigrant Case (189 U. S., 99) the Supreme Court used this language: "Taking all its enactments together it is clear that Congress did not intend that the mere admission of an alien or his mere entering the country should place him at all times thereafter entirely beyond the control or authority of the executive officers of the government. On the contrary, if the Secretary of the Treasury became satisfied that the immigrant had been allowed to land contrary to the prohibition of that law, then he could at any time within a year after the landing cause the immigrant to be taken into custody and deported. The immigrant must be taken to have entered subject to the condition that he might be sent out of the country by order of the proper executive officers if within a year he was found to have been wrongfully admitted into it, or illegally entered the United States." By the present act the time within which this power could be exercised by the Secretary of the Treasury was extended to the period of three years after the landing or entering of the immigrant, and was subsequently transferred to the Secretary of Commerce and Labor. It is the plain purpose of

the drastic legislation embodied in the immigrant exclusion acts to provide every possible safeguard against the abuse by aliens of the prohibited classes of the privilege of coming to or remaining within this country. There is no repugnance between the power conferred upon the Board of Special Inquiry and that conferred upon the Secretary. The former is to be exercised summarily, and while the immigrant is under detention awaiting the result of the inquiry. The board has no authority to compel the attendance of witnesses, and must decide upon such evidence as is at hand or is readily accessible. Of necessity its decisions do not have the quality of even approximate infallibility. It is hardly conceivable that Congress should have intended that such a decision should be a final determination of the status of the alien. Manifestly Congress intended not only that the Secretary might review the question whether he should be allowed to enter upon an appeal from the decision, but also that at any time within three years the Secretary should have the power to reconsider the broader question of the right of the alien to remain, and upon reaching an adverse conclusion to order his deportation. This is not a power to be exercised arbitrarily, and deportation is to be ordered only after giving the alien an opportunity to be heard upon the questions involving his privilege. In the present case before deportation of the aliens had been ordered they had been heard; and it is to be presumed that the power of deportation would not have been exercised unless after a fair hearing the Secretary had become convinced that they were here in violation of law.

The order is reversed, with instructions to remand petitioners to custody of respondent.

Judge Coxe dissents.